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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1013

IN THE MATTER OF THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH," ULYSSES WALLS; NORMAN PRINCE and ERNEST HERNDON, a/k/a, "JABO," FOR A WRIT OF CERTIORARI.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered October 31, 1967, rehearing denied December 14, 1967.

STATEMENT OF THE MATTER INVOLVED

Petitioners heretofore applied to the United States District Court for the District of New Jersey for a writ of habeas corpus. They sought relief from a judgment entered in the Superior Court of New Jersey on November 2, 1962,

following a jury verdict, which judgment charged them with conspiracy to conduct a lottery, in violation of *N. J. S. A. 2A:98–1 & 2.* Their application was denied and appeal was taken to the United States Court of Appeals for the Third Circuit, which in turn affirmed the District Court. An application was then made for a rehearing before the court en banc, which application was denied.

Pursuant to the rules, the Clerk of the Circuit Court has been asked to file the appropriate record with this court. In this statement when we refer to the record below, we will take the paging as shown by the printed record in the appellate court. The facts which illuminate this controversy are succinctly set forth in Judge Augelli's opinion in the District Court found at pages 3a to 13a.

The case presents the question of a warrantless search. It arose in the following manner. All of the petitioners stood trial as conspirators. One of them, Norman Prince, resided in the City of Englewood, County of Bergen, New Jersey. On April 10, 1962, George B. Gelman and Anthony A. Andora, assistant county prosecutors, drove to the home of Prince. The trip was made in a private automobile. As they came to the vicinity of Prince's home, he was observed about to enter the premises. They called to him and he met them at the door of his home. There he was told that they had a search warrant. They then proceeded to search his home but found nothing of an incriminating nature. They then searched his person and found cash totaling $752.24, some personal business cards, and a wallet (7a). These items were admitted in evidence at the trial over objection that they had been seized pursuant to an improperly issued search warrant.

From the resulting judgment of conviction, an appeal was taken to the Appellate Division of the Superior Court of New Jersey, the intermediate appellate court. Appellants argued that the search warrant was improperly issued. The State maintained the contrary, and also asserted that the evidence was immaterial. While the cause was

awaiting decision, the court inquired of counsel for both Petitioners and the State whether an arrest warrant had been issued. This inquiry arose because of a suggestion at the trial that an arrest warrant had in fact been issued. Both counsel agreed that there was no such warrant. Actually the so-called search warrant was never found, nor the complaint upon which it was based. The proceedings were conducted on the authenticity of carbon copies. The appellate court reversed the conviction on the ground that the trial judge had improperly inquired of the jury the numerical vote when it reported it was hopelessly deadlocked. The court then went on to rule that the search warrant was improperly issued and that the evidence should not have been introduced at the trial.

The State then applied for and obtained certification from the Supreme Court of New Jersey. In its brief it adhered to its position below that the search warrant was properly issued, but in any event that the evidence seized was immaterial. At the oral argument, however, it advanced for the first time the suggestion that Prince was lawfully arrested, and therefore there was a proper search as an incident to a lawful arrest. The Supreme Court of New Jersey reversed the action of the Appellate Division for holding that the trial judge erred in interrogating the jury. It sustained the Appellate Division on its holding that the search warrant was improperly issued. It further held that the evidence seized was crucial. It remanded the cause to the trial court to determine whether there had been a lawful arrest and a search incident thereto. *State* v. *Hutchins, 43 N. J. 85 (1964).* The Supreme Court stated that it retained jurisdiction of the cause. On the remand testimony was taken and it is printed starting at page 23a. The trial court stated that there was a lawful arrest and a valid search incident thereto.

We must now state another issue that arose in the case. One of the defendants, Herndon, had not taken the stand at the trial at the State level. Both the prosecutor and the

trial court commented on this failure. That was a correct statement of the law as it was understood in 1962. *State* v. *Corby, 28 N. J. 106 (1958).* In the interim, however, this court decided *Malloy* v. *Hogan, 378 U. S. 1 (1964).* Counsel for petitioners then called to the attention of the Supreme Court of New Jersey the decision in *Malloy* and asserted that the trial court's charge vitiated the judgment. The State court filed a per curiam opinion on February 11, 1965 concurring in the trial court's conclusions as to the arrest, *44 N. J. (1965).* It then held that the action of the trial court in commenting on the failure of Herndon to take the stand was not before it because of the limited retention of jurisdiction.

Petitioners then applied to the District Court for a writ of habeas corpus, and while that application was pending, this court decided *Griffin* v. *California, 380 U. S. 609.* The District Court then filed its opinion of May 18, 1965, dismissing the petition, without prejudice, in order that the petitioners might seek post-conviction relief in the State Courts in the light of the holding in *Griffin.*

At the trial level, post-conviction relief was refused and an appeal was taken and argued before the State Supreme Court on January 10, 1966. On January 19, 1966 this court decided *Tehan* v. *Shott, 382 U. S. 406.* The holding there was that except for cases still pending on direct appeal or reivew, that the *Griffin* rule need not be given retrospective application.

Thereafter, petitioners filed a second application for habeas corpus and the question presented to the District Court was whether there was in fact a valid arrest, No. 1; and number 2, if there was such a valid arrest, was that in turn vitiated by the failure of the State authorities to immediately arraign Prince before the nearest available magistrate, in accordance with the appropriate rules of the state court.

The District Court judge held that the findings of the state court were supported by the record, and further held

that failure to immediately arraign Prince did not reach constitutional dimension.

His judgment was affirmed by the Court of Appeals for the Third Circuit.

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code, Section 1254, together with the Fourth Amendment to the United States Constitution as implemented by the Fourteenth Amendment.

QUESTIONS PRESENTED

1. Whether it was permissible to make a search of the person of the petitioner, Prince, without a warrant.

2. Whether the State of New Jersey, purporting to act under the protection of a search warrant improperly issued, can justify the invasion of the petitioner's (Prince) home and the search of his person on the theory that he was lawfully arrested on a charge of a misdemeanor and a search of his home and person could be justified on the theory of a lawful arrest.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

If *Mapp* v. *Ohio, 367 U. S. 643 (1961)* was intended to impress on the law enforcement agencies of the States the sacredness of the citizen's person and premises, the number of cases reaching this court since that decision indicates a failure of purpose. We think the fault lies with the law enforcing agencies. There is a paradox in hailing a citizen into court charged with violating the law of the land when the prosecuting officials themselves have violated that same law. Limiting the ci zen to a civil action for damages did not stop the evil. This court concluded that the only effective way to make the constitutional privilege meaningful

was to prevent the State from using evidence illegally obtained. Unfortunately the law enforcing agencies, while giving lip service to *Mapp,* have been astute to find ways of evading it. The cases reaching this court, even under the limitations fixed on the issuance of the writ of certiorari, prove this fact.

The case now under review demonstrates the ease with which the constitutional protection is made nugatory. A search warrant is obtained and under its ambit a search is made of Prince's home and person. A motion is made in the State tribunal to suppress the evidence so obtained. This effort is resisted by the State on the theory that the search and seizure were justified by the warrant previously issued, and that there was probable cause for the issuance of that warrant. The trial court adheres to that view. Upon appeal the State again justifies its actions as being authorized by a validly issued search warrant. The intermediate appellate court rejects that contention. On appeal to the court of last resort, the State, for the first time, claimed a lawful arrest, without a warrant, and a search of person and premises pursuant thereto. It nevertheless maintained its position that the search warrant was properly issued and afforded ample protection. The State Supreme Court remands to determine whether there was a lawful arrest and a search incident thereto. The Assistant Prosecutor who handled the case against these petitioners at the trial level then testified that he had arrested Prince, based on a statement given to him some days before by an alleged accomplice. The trial court accepted this statement and it immediately raises the question here whether the constitutional immunities are to be emasculated by weighing the testimony of the law enforcing officers against that of the citizen whose rights have been invaded. If the balance is to be struck in favor of the State, the long and painful road which was traveled to *Mapp* was run in vain.

In *Camara* v. *Municipal Court, 387 U. S. 523, 528-29 (1967)* this court said that except in certain carefully de-

fined classes of cases a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. It has long been settled, by this court, that a warrantless search of a private dwelling, no matter how "reasonable" it would have been if a warrant had been obtained, is nevertheless impermissible unless it falls within one of the specially defined exceptions from the warrant requirement. *Agnello* v. *U. S., 269 U. S. 20 (25).*

An officer is justified in making a search incident to a lawful arrest when there is need to seize weapons which the suspect might use to assault the officer or effect an escape, or to prevent him from destroying evidence. *Preston* v. *U. S., 376 U. S. 364, 367 (1964); U. S.* v. *Rabinowitz, 339 U. S. 56, 72 (1950).*

It must be observed that these exceptions are based on necessity. For instance, in *Camara* this court declared that the various justifications for warrantless searches depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *387 U. S., at 533.*

The very purpose in requiring a search warrant is to permit a judicial screening of the facts upon which the officers rely. Such men are not permitted to be both prosecutor and judge. The judiciary stands between the law enforcing agency and the citizen, and requires that an appropriate balance be struck between the need of enforcing the law and securing the citizen his constitutional immunities. Mr. Justice Brennan in his dissent in *Abel* v. *U. S., 362 U. S. 217, 249-53 (1960)* implied that it might not be unreasonable to dispense with prior judicial scrutiny in cases of searches incident to arrest, since there would always be immediate subsequent judicial review in the form of an arraignment proceeding. This court did not adopt his views, but it is pertinent to note that here there was not an arraignment in accordance with the State procedure. This theory was argued by the petitioners in the court below both on the

original hearing and on the application for reargument before the court en banc. The point was also argued in the District Court (11a). The District Court judge found an arrest on April 10, 1962 and a waiver in writing by Prince the following day of any arraignment and preliminary hearing. The District Court judge said that this did not spell out a violation of any of his federally protected rights. The Court of Appeals concurred in that view.

In view of the concern which this court has manifested that prospective defendants be afforded the right of counsel at every meaningful step in the criminal process, we question whether the courts below appreciated the sweep of their holdings. In *U. S.* v. *Wade, 388 U. S. 218 (1967)* this court ruled that court room identifications could not be received in evidence if they were based upon observations made at a lineup where the defendant was not represented by counsel. In *Gilbert* v. *California, 388 U. S. 263 (1967)* the court similarly held inadmissible testimony concerning any identification made at such a lineup.

It is an elementary rule of law that if an officer purports to act on the authority granted him by law, and then steps outside of the protection of that law, he becomes a trespasser *ab initio*. If that be so, while not in the least agreeing that the initial "arrest" was lawful, the failure to promptly arraign Prince in accordance with the State procedure rendered the arrest unlawful.

This court has, in the interest of necessity, relaxed the rule requiring a warrant with respect to automobiles. *Cooper* v. *California, 386 U. S. 58 (1967)*. Due to the mobility of the vehicle to be searched, we can surely understand why the law enforcing officers might be given some leeway. Nevertheless, we feel that in accordance with the holdings in *Trupiano* v. *U. S., 334 U. S. 699 (1948)* and *McDonald* v. *U. S., 335 U. S. 451 (1948)*, a warrant should be obtained whenever it is reasonable to do so. Note, Search and Seizure in the Supreme Court: *Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 688 (1961)*.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ or certiorari should be granted.

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NORMAN PRINCE and ERNEST HERNDON,
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No. 1013

IN THE MATTER OF THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH," ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a, "JABO," FOR A WRIT OF CERTIORARI.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 16360 to 16363

IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO", FOR A WRIT OF HABEAS CORPUS.

SUR PETITION FOR REHEARING

Present: STALEY, *Chief Judge*, and McLAUGHLIN, KALODNER, HASTIE, FORMAN, FREEDMAN, SEITZ, VAN DUSEN, *Circuit Judges*.

THE PETITION FOR REHEARING FILED BY

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a "JABO", Appellant in No. 16363.

in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN, *Judge*.

Dated: December 14, 1967.

United States Court of Appeals

FOR THE THIRD CIRCUIT

NOS. 16360 TO 16363

IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO", FOR A WRIT OF HABEAS CORPUS.

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a "JABO", Appellant in No. 16363

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued September 28, 1967

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 31, 1967)

PER CURIAM.

This is an appeal from the denial of a writ of habeas corpus by the United States District Court for the District of New Jersey upon the application of Francis Hutchins, Ulysses Walls, Norman Prince and Ernest Herndon. It is

based chiefly on the contention that evidence was erroneously admitted against them in their trial for conspiracy in the Bergen County Court (New Jersey) because it was the tainted product of a search of the person of Mr. Prince made incidental to his arrest without a warrant. This argument was advanced unsuccessfully in the New Jersey Courts.[1] In the United States District Court it was also urged that should the arrest be deemed lawful the search was invalidated because Mr. Prince was not properly arraigned before the nearest magistrate pursuant to the New Jersey Rules of Criminal Practice.[2]

We have reviewed the record and agree with the conclusions reached by Judge Augelli in his Memorandum and Order[3] that neither the search and arrest of Mr. Prince nor the failure to arraign him in strict compliance with the New Jersey Rules of Criminal Practice were violative of his federal constitutional rights.

The order of the District Court denying the writ of habeas corpus, filed November 2, 1966, will be affirmed.

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1 State v. Hutchins, 43 N.J. 85 (1964), *aff'd after remand*, 44 N.J. 49 (1965).

2 N.J.R.R. 3:2-3(a).

3 In the Matter of the Application of Francis Hutchins, a/k/a "HUTCH", Ulysses Walls, Norman Prince and Ernest Herndon, a/k/a "Jabo", Civil No. 346-66 (D.N.J., filed Nov. 2, 1966).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals

FOR THE THIRD CIRCUIT

NOS. 16360 TO 16363, INCLUSIVE

IN THE MATTER OF

THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "JABO",

FRANCIS HUTCHINS, a/k/a "HUTCH", Appellant in No. 16360

ULYSSES WALLS, Appellant in No. 16361

NORMAN PRINCE, Appellant in No. 16362

ERNEST HERNDON, a/k/a as "JABO", Appellant in No. 16363

(D. C. Civil Action No. 346-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed November 2, 1966, be, and the same is hereby affirmed, with costs.

Attest:

THOMAS F. QUINN, *Clerk.*

October 31, 1967.

United States District Court

DISTRICT OF NEW JERSEY

In the Matter of the Application of FRANCIS HUTCHINS, a/k/a "Hutch", ULYSSES WALLS, NORMAN PRINCE and ERNEST HERNDON, a/k/a "Jabo", for a Writ of Habeas Corpus.

Civil Action No. 346-66.

MEMORANDUM AND ORDER

AUGELLI, *District Judge*:

This is a second application for habeas corpus relief in this matter. In the first application, filed March 3, 1965, petitioners alleged a violation of their federal constitutional rights in several particulars. Briefly stated, these centered around the lawfulness of the arrest of petitioner Prince, the search and seizure made in connection therewith, the use of the seized material as evidence in the case, and the trial judge's comment to the jury on the failure of petitioner Herndon to testify.* It was contended that these alleged errors vitiated the guilty verdice returned by the jury against all petitioners.

On the first application, this Court considered only the claim of error based on the trial judge's comment on Herndon's failure to take the witness stand. As to this, petitioners contended that the refusal of the Supreme Court of

* Petitioners were sentenced on November 2, 1962, following their conviction by a jury on a charge of conspiracy to conduct a lottery in violation of N.J.S.A. 2A:98-1 and 2. The trial judge's comment regarding Herndon's failure to testify was permissible under New Jersey law as understood and applied at the time of the trial of this case in 1962. *State* v. *Corby*, 28 N.J. 106 (1958).

New Jersey to retrospectively apply to the facts of this case the rule of *Malloy* v. *Hogan*, 378 U. S. 1, resulted in a deprivation of rights secured to them by the Fifth and Fourteenth Amendments.

This case was first argued before the State Supreme Court on April 24, 1964. That Court's opinion, filed July 7, 1964, decided all questions involved in the appeal except one pertaining to the lawfulness of Prince's arrest and the search and seizure made in connection therewith. On this sole issue, the case was remanded to the trial court for further proceedings, the remand order providing that "jurisdiction of the cause be retained in this court." *State* v. *Hutchins*, 43 N. J. 85 (1964). The trial judge took testimony on the remanded issue, made his determination, and filed a transcript of the hearing with the State Supreme Court. Argument before that Court on the remanded issue was heard on January 5, 1965. It was then that petitioners, for the first time, sought to invoke the ruling of *Malloy* v. *Hogan*, supra, which had been decided on June 15, 1964.

In a per curiam opinion filed on February 11, 1965, the State Supreme Court expressed agreement with the trial judge's finding on remand that the arrest of Prince was lawful, noted that this disposed of all issues on the appeal, and affirmed the convictions of petitioners. *State* v. *Hutchins*, 44 N. J. 49 (1965). As to *Malloy*, the Court said:

> "All defendants raise another issue which was not before us at the original argument. They contend that the United States Supreme Court in *Malloy* v. *Hogan*, 378 U. S. 1, 84 *S. Ct.* 1489, 12 *L. Ed. 2nd* 653 (1964), decided after that argument, has made any comment by a trial judge of a defendant's failure to testify in his own defense a violation of the defendant's Fifth and Fourteenth Amendments rights. Herndon was the only defendant who did not take the stand. Defendants argue that the trial court's comment on the failure of Herndon to testify was reversable error as to all of them. The issue is not before us, for, as stated above,

we concluded on the first appeal all issues except the one embraced by the remand."

It was following this determination that petitioners first applied to this Court for federal habeas corpus relief. Shortly thereafter, on April 28, 1965, the Supreme Court of the United States decided *Griffin* v. *California*, 380 U. S. 609. That case held that adverse comment concerning failure of a defendant to testify in a State criminal trial violated the self-incrimination clause of the Fifth Amendment which, in *Malloy*, had been made applicable to the States by the Fourteenth Amendment. However, neither *Malloy* nor *Griffin* furnished clear guidance as to whether the rules enunciated by those cases should be given retrospective as well as prospective effect. Under the circumstances, and for the reasons set forth in this Court's Opinion and Order filed May 18, 1965, in Civil Action No. 221-65, the petition filed herein on March 3, 1965, was dismissed without prejudice in order to enable petitioners to seek post-conviction relief in light of *Griffin*, and thus give the State Courts an opportunity, in the first instance, to pass upon the question of whether *Griffin* should be given retrospective application.

Parenthetically, it may be noted that while *Malloy* extended to the States, by way of the Fourteenth Amendment, the Fifth Amendment privilege against self-incrimination, it did not directly involve the question of adverse comment on a defendant's failure to testify in a State criminal trial. The rule prohibiting such comment was not articulated until *Griffin* was decided on April 28, 1965. In *State* v. *Johnson*, 43 N. J. 572, decided January 19, 1965, the State Supreme Court, at page 591, stated, "* * * we express no opinion as to whether *Malloy* forbids comment by the prosecutor or the court on defendants' failure to testify. Nor do we express an opinion whether, if *Malloy* does forbid such comment, that rule should be applied retroactively in a collateral proceeding under circumstances other than those in this case."

The post-conviction route followed by petitioners after the dismissal of their petition by this Court, again brought them before the State Supreme Court. The matter was argued on January 10, 1966. On January 19, 1966, the Supreme Court of the United States decided *Tehan* v. *Shott*, 382 U. S. 406. That case held, that except for cases still pending on direct appeal or review at the time *Griffin* was announced on April 28, 1965, the *Griffin* rule need not be given retrospective application. See also, *United States* v. *Pate*, 357 F. 2d 911 (7 Cir. 1966); *United States* v. *Follette*, 358 F. 2d 922 (2 Cir. 1966); *Mordecai* v. *United States*, 252 F. Supp. 694 (D. Col. 1966). In a per curiam opinion filed on March 7, 1966, *State* v. *Hutchins*, 46 N. J. 439, the State Supreme Court again denied petitioners' claim for relief. Commenting upon *Tehan*, which had not been decided when the matter was argued on January 10, 1966, the Court said:

> "* * * we think that *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 86 *S. Ct.* 459, 15 *L. Ed 2nd* 453 (Jan. 19, 1966), which deals with the problem of retrospective application of *Griffin* does not require that any of our judgments, which defendants did not seek to review directly, should be undone upon this collateral attack."

It was after this decision was handed down that petitioners filed their second application for habeas corpus relief in this Court. Unless it can be said that petitioners' case was still pending on direct review on April 28, 1965, the date *Griffin* was announced, *Tehan* does not require a retrospective application of the *Griffin* rule. It is obvious that petitioners' case was not pending on direct review in the State courts on April 28, 1965. As previously mentioned, the State Supreme Court, on February 11, 1965, had disposed of the reserved issue dealing with the arrest of Prince, and affirmed the judgments of conviction of all petitioners. As was stated by the Court, at 46 N. J. 442:

> "* * * it would not be in the public interest to undo on collateral attack judgments of conviction the finality of which was realistically settled long before *Griffin*. The values which *Griffin* seeks affirmatively to sustain for the future do not call for a renewal of this extended litigation as to all or any of these defendants."

Based on the *Griffin* date of April 28, 1965, which this Court finds is controlling here, it is clear that petitioners are not entitled to have the *Griffin* rule applied retrospectively to this case.

Consideration will now be given to the contentions made with respect to the alleged unlawfulness of Prince's arrest, the search and seizure made in connection therewith, and the use of the seized material as evidence in the trial of the case.

Petitioners were indicted, with two others not involved herein, for conspiring with one Peter Foti, who was not named as a defendant, to conduct a lottery in Englewood, New Jersey, between January 1, 1959 and April 10, 1962. Foti was the State's chief witness, and he testified in detail concerning the involvement of petitioners in the crime charged in the indictment.

Foti was arrested on April 4, 1962, at his gocery store in Englewood. Thereafter, he told the police about his association with petitioners in the illegal operation of "writing the numbers," the modus operandi that was followed in carrying out this activity, and the participation of petitioners therein. During the period that this operation was being conducted, the slips representing the daily play were first collected from Foti by petitioner Wall, and thereafter, at different subsequent intervals, successively by petitioners Herndon, Hutchins and Prince.

On April 10, 1962, at about 11:00 o'clock in the morning, Prince was arrested as he was about to enter his home. The arrest was effected by two assistant prosecutors of Bergen

County, George Gelman and Anthony Andora. These men exhibited to Prince what he said was described to him as a "search warrant and arrest warrant." Prince invited Gelman and Andora into his home. A search of the premises was made, but nothing was obtained as a result thereof. However, a search of Prince's person, following a direction that he empty his pockets, produced cash totalling $752.24, some personal business cards, and a wallet. These items were admitted in evidence against Prince at the trial over his objection that they had been seized pursuant to an improperly issued search warrant.

When the appeal in this case reached the State Supreme Court, that tribunal agreed with the conclusion reached by the Appellate Division that if the evidence taken from Prince rested upon the validity of the search warrant, such evidence should have been suppressed because the warrant was issued without a sufficient showing of probable cause. However, the State Supreme Court was satisfied, on the basis of the record before it, "* * * that Foti's statement to the police upon his arrest on April 4, 1962 implicating Prince constituted probable cause for arrest of Prince without a warrant." But The Court posed the question as to whether the search of Prince's person was incidental to an arrest, and observed in this connection that it was unimportant whether the search was made before or after the arrest so long as there was an intent to arrest regardless of the outcome of the search. Since the record did not permit a resolution of this issue, the matter was remanded to the trial court for a determination thereof.

On August 20, 1964, the trial judge took testimony on the remanded issue and found that "* * * the search of the person of Prince, the requirement in the house that he empty his pockets, was incidental to his arrest and not a search under the search warrant; that the defendant Prince's arrest was predetermined by the Prosecutor and the mission of the Assistant Prosecutor to the Prince residence was the arrest of Prince; that it was the intent of

the Prosecutor and the Assistant Prosecutors assigned to the case to arrest Prince regardless of the search, regardless of the outcome of the search, on the information with respect to his involvement in the offense obtained from Foti; and further, that the arrest had been determined prior to the disclosure resulting from the search warrant and not after or resulting from the disclosure obtained under the search warrant."

In a per curiam opinion filed February 11, 1965, *State* v. *Hutchins,* 44 N. J. 49, the State Supreme Court agreed with the findings of the trial judge on the remanded issue, and stated that "[t]he trial court conducted a full hearing and found that the arrest of Prince was not based upon the product of a search but was made pursuant to a pre-existing intent of an arresting officer to take Prince into custody. We agree. This disposes of the only reserved issue."

Petitioners vigorously attack the lawfulness of Prince's arrest, which was effected without a warrant, and the existence of probable cause therefor. They challenge, as an afterthought on the part of the State, the assertion that there was a pre-existing intent to arrest Prince regardless of the outcome of the search that was made. Petitioners also question the sufficiency of the findings made by the trial judge of this issue on remand, and the "pro forma" approval of such findings by the State Supreme Court.

It is not disputed that a lawful arrest may be made without a warrant if there is probable cause therefor, that a search of the person and seizure of incriminating evidence may be made as an incident to such lawful arrest, and that evidence so obtained is admissible in evidence at the trial of such person. *United States* v. *Carlson,* 359 F. 2d 592 (3 Cir. 1966). See also, *State* v. *Doyle,* 42 N. J. 334, 342 (1964).

With the guidelines of *Townsend* v. *Sain,* 372 U. S. 293 (1963) in mind, this Court has made an independent study of the State Court record. The factual determination of the

lawfulness of Prince's arrest is amply supported by the record. The trial judge, on this issue, heard the testimony of the arresting officers, Gelman and Andora, as well as that of petitioner Prince. Gelman testified that as a result of information obtained from Foti on April 4, 1962, in the form of a sworn statement involving Prince in the illegal activity, he maintained a surveillance on the movements of Prince, reported his observations to his superior, the Prosecutor of Bergen County, and received from him instructions to arrest Prince. Pursuant to these instructions, and accompanied by Andora, the arrest of Prince was made on April 10, 1962. The witness was definite in his testimony that when he approached Prince as the latter was about to enter his home, he told Prince that he was under arrest. Gelman also testified that he made up his mind to arrest Prince "about the day before the arrest was made," and that he did not secure an arrest warrant because "I didn't feel that I needed a warrant to arrest him [Prince] based upon the information which I had * * *." There was further testimony by Gelman that after the arrest was made, he prepared a complaint against Prince and appeared for the State at Prince's arraignment before Judge Dalton on April 10, 1962.

On direct examination, Prince denied that Gelman used any language to indicate that an arrest was being made. Prince's recollection being that reference was only made to a search warrant, and that it was not until he was brought to the Prosecutor's Office by Gelman and Andora that he was told he was under arrest. However, on cross-examination, Prince admitted that when Gelman approached and confronted him, the word "arrest" was used. But he said the word "arrest" was used in a context that indicated the existence of an arrest warrant.

It is obvious that the conflicting stories told by Gelman and Prince raised an issue of credibility. The resolution of this factual issue by the trial judge in favor of the State, and the approval thereof by the State Supreme Court, being

fairly supported by the record, will not be disturbed by this Court. *Townsend* v. *Sain,* supra. From the record as a whole, this Court is satisfied that proper constitutional standards were applied in determining the lawfulness of Prince's arrest, the search and seizure made in connection therewith, and the use made of the seized material at the trial. See *United States* v. *Carlson,* supra; *Agnello* v. *United States,* 269 U. S. 20 (1925); *Harris* v. *United States,* 331 U. S. 145 (1947); *Draper* v. *United States,* 358 U. S. 307 (1959).

A further argument advanced by petitioners is that Prince's arrest, if otherwise lawful, became unlawful *ab initio* because he was not brought before a magistrate without unnecessary delay as required by R. R. 3:2-3(a) of the New Jersey Rules of Criminal Practice. The pertinent part of the cited Rule provides that "[a] person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith."

The record shows that after Prince was arrested on April 10, 1962, a warrant for his commitment, based on a complaint charging Prince with a violation of N.J.S.A. 2A:98-1 and 2, and also N.J.S.A. 2A:121-3, was issued by Judge Dalton of the Bergen County District Court, in which bail was noted to be fixed at $15,000.00. On the following day, April 11, Prince, in writing, agreed to waive arraignment and a preliminary hearing on the charges preferred against him.

Even if it be assumed as contended by petitioners, that there was a violation of R. R. 3:2-3(a), such violation, without more, does not spell out the violation of any of Prince's federally protected rights. There is absolutely no showing that Prince was prejudiced by the action taken by the local authorities in connection with the alleged failure to arraign Prince "without unnecessary delay." The rule

of *McNabb* v. *United States,* 318 U. S. 332 (1943) and *Mallory* v. *United States,* 354 U. S. 449 (1957) which requires in federal criminal proceedings, an arraignment without unnecessary delay, is not of constitutional dimension. It is applicable only to federal law enforcement officers. *United States* v. *State of New Jersey,* 332 F. 2d 810 (3 Cir. 1963); *United States* v. *Carlson,* supra.

This Court is satisfied that none of the petitioners have been deprived of any federal constitutional rights in the particulars alleged, and that their application for a writ of habeas corpus should be denied. At the time of the filing of their petition, petitioners prayed that in the event this Court should deny relief, that certificate of probable cause issue pursuant to 28 U.S.C.A. §2253. In view of the disposition made of this matter, and the fact that two of the petitioners face short 30 day sentences, the Court feels that a certificate of probable cause should issue. Because of the short 30 day sentences and the uncertainty surrounding the retrospective application of *Griffin* prior to *Tehan,* this Court, after petitioners had been taken into State custody, admitted them to bail pending a determination of their application for federal habeas corpus relief. *Johnston* v. *Marsh,* 227 F. 2d 528 (3 Cir. 1955).

It is therefore, on this 2nd day of November, 1966,

ORDERED, That the petition of Francis Hutchins, a/k/a "Hutch", Ulysses Walls, Norman Prince, and Ernest Herndon, a/k/a "Jabo", for a writ of habeas corpus be, and the same hereby is, denied; and it is further

ORDERED, That the application of said petitioners for a certificate of probable cause be, and the same hereby is, granted; and it is further

ORDERED, That the present bail of petitioners be continued pending disposition made of this matter by the Court of Appeals.

ANTHONY T. AUGELLI,
United States District Judge.

The Clerk of this Court will please mark as court exhibits in this case, the following items furnished by the Prosecutor of Bergen County: transcript of hearing on remand from the Supreme Court dated August 20, 1964; brief and appendix in support of findings of fact and law in the County Court filed with the Supreme Court; supplemental brief filed with the Supreme Court in the same matter on January 25, 1965; photostatic copies of letters dated September 10, 1963, September 24, 1963, September 26, 1963, October 1, 1963, May 26, 1964, and May 27, 1964; transcript of statement of Norman D. Prince taken on April 10, 1962; copy of unreported opinion of the Appellate Division filed November 13, 1963; brief and appendix in the Appellate Division on behalf of petitioners; brief and appendix in the Appellate Division on behalf of the State of New Jersey; and brief of the State of New Jersey filed with the Supreme Court. The Clerk will also mark as court exhibits the following items furnished by petitioners: order on remand filed July 7, 1964; brief in the Supreme Court on behalf of petitioners; supplemental brief in the Supreme Court on behalf of petitioners; and answer to supplemental brief of Prosecutor filed in the Supreme Court.

ANTHONY T. AUGELLI,
United States District Judge.